IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.04.2006

CORAM

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

W.P.No.6379 of 2006 and
W.P.M.P.Nos.6876 and 6877 of 2006

Shri. B.Prasanna Kumar, Proprietor,
M/s. Mangalam Enterprises
No.11, Kannapa Mudali Street
Chennai - 600 079. ... Petitioner

Vs.

1. The Deputy Commissioner of Customs (Docks)
APPG, Docks (UCC)
Ground Floor, Customs House,
No.33, Rajaji Salai, Chennai - 600 001.

2. The Assistant Commisioner of Customs (Docks UCC),
APPG, Docks (UCC),
Ground Floor, Customs House,
No.33, Rajaji Salai, Chennai - 600 001. ... Respondents.

Prayer : Petition filed under Article 226 of the Constitution of India Praying for the issuance of a Writ of Certiorari calling for the records ending with Order F.No.Lot No.05/05 Sanco Trans CFS Docks (UCC) dated 23.2.2006 passed by the second respondent and quash the same.

For Petitioner : Mr.S.Dayaleeshwaran
For Mr.N.Kirupakaran

For Respondents : No appearance.

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O R D E R

The above writ petition has been filed in the following circumstances:

The petitioner is one of the registered bidders of the E - auction being held by the Customs authorities for clearing "uncleared cargo" and the petitioner has been issued with an identity card bearing Registration No.04/03 (Bidder Identity Card).

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2. The petitioner has participated in the E Auction No.127 (UCC & CCTL), which was conducted on 16.05.2005 for clearing the goods 'Thick Aluminia linings' covered by Lot No.5/05. He was declared as successful bidder for Rs.1,71,000/- and the first respondent accepted the offer made by him and requested/advised him vide their letter dated 28.12.2005 to approach the respective custodian/warehouse keeper, make payment in cash or by demand draft and take delivery of the goods. Pursuant to the receipt of the aforesaid letter dated 28.12.2005, he made payment to the custodian/warehouse keeper of Rs.1,71,000/- towards the full sale value under Receipt No.21248 dated 12.1.2006. Besides the aforesaid payment, he also made a further payment of Rs.17,955/- towards Sales Tax and Surcharge under Receipt No.1249 dated 19.1.2006 and made another payment of Rs.1,983/- on 19.1.2006 towards Destuffing charges. Thus he has paid the entire sale consideration and other statutory duties and service charges. The goods were destuffed from the container and were loaded in the vehicle on 19.1.2006. When the vehicle was about to take the goods out of the warehouse, the warehouse officials abruptly stopped the vehicle stating that there was an instruction not to release the goods and asked the petitioner to wait for one more day. Since the cargo was not released till Tuesday, the petitioner made arrangements to unload the cargo from the vehicle and he sustained loss for a sum of Rs.15,000/- towards vehicle, loading and unloading charges unnecessarily.

3. Since the respondents unilaterally denied to release the goods, the petitioner sent representations dated 01.02.2006 and 20.02.2006 requesting the respondents to release the goods forthwith. Pursuant to that, the petitioner received an order bearing No.05/05 Sanco CFS Docks (UCC) dated 23.02.2006 from the second respondent intimating that due to administrative reasons, the respondents have decided to withdraw the auctioned goods from the sale and hence they are not in a position to deliver the cargo covered under E Auction No.127 held on 16.12.2005. Being aggrieved by the above said order, this writ petition has been filed for the issuance of a Writ of Certiorari to quash the impugned order.

4. The main contentions of the petitioner are, since the petitioner has paid the entire sale consideration, statutory dues and other service charges, the title of the goods has passed on to the petitioner and hence the respondents have no jurisdiction or right to pass the impugned order. The impugned order is a non-speaking order and the same has been passed unilaterally without affording an opportunity of hearing to the petitioner and hence its violates the principles of natural justice.

5. Heard Mr. S.Dayaleeshwaran, learned counsel appearing for the petitioner.

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6. The learned counsel reiterated the above said contentions raised in the writ petition and relied upon a decision of the Supreme Court reported in 2001 (8) S.C.C. 491 (Union of India Vs. Dinesh Engineering Corporation). In the said judgment, the Supreme Court in Paragraph No.12 held as follows:

> "Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."

Relying on this, the learned counsel for the petitioner submitted that the respondents have passed the impugned order without considering the relevant facts and the impugned order does not disclose the reasons for withdrawing the auctioned goods from sale.

7. The learned counsel further submitted that though the impugned order refers to condition No.11 of the general conditions of sale, which reads as follows:

> "Any lot or part thereof may be withdrawn from the sale at any time before it is actually physically delivered out of the campus without disclosing the reasons for such withdrawal. However, if any payment has been made it would be refunded without any interest".

that will not entitle the respondents to refrain from disclosing the reasons for such withdrawal.

8. I am unable to accept the said contention of the learned counsel for the petitioner. The impugned order cannot be said to be arbitrary or opposed to the principles of natural justice. It is categorically stated in condition No.11 that any lot or part thereof may be withdrawn from the sale at any time before it is actually physically delivered out of the campus without disclosing the reasons for such withdrawal. It is not the case of the petitioner that the goods were actually physically delivered out of the campus. Further, the petitioner has been advised to approach Sanco CFS to get the amount paid by him refunded, which is strictly in accordance with the above said condition. The petitioner may not be put to any financial loss. The petitioner had taken part in the E-Auction only after fully knowing about the general conditions of sale including condition No.11 of the general conditions of sale. Having accepted the conditions of sale and having taken part in the E Auction, accepting to abide by the general conditions of sale, it is not open

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to the petitioner to question the right of the respondents to withdraw the auctioned goods from the sale. In the impugned order, it is clearly stated that due to administrative reasons, the auctioned goods have been withdrawn from the sale. Condition No.11, as extracted above, clearly shows that the respondents are entitled to withdraw the auctioned goods from sale without disclosing the reasons for such withdrawal.

9. In this context one should bear in mind that the E Auction conducted is in respect of confiscated goods meant for export/import and uncleared cargo, if any reasons are disclosed, it may affect the interest of the department. That is why, in my considered view, the above said condition No.11 has been incorporated in the auction conditions.

10. To better appreciate the contention of the learned counsel for the petitioner, based on 2001 (8) S.C.C. 491, it is necessary to consider under what circumstances and in the background of what factual matrix the said ratio was laid down in that case has to be analysed. It will be useful to refer to Paragraph No.16 of the said judgment, which reads as follows:

> "A public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while, we are told the Railways are making purchases without any tender on a proprietary basis only from EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court".

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Thus, the facts of the case in 2001 (8) S.C.C. 491 and the facts of the instant case are totally different.

11. The question of discrimination does not at all arise in this case. In 2001 (8) S.C.C. 491, the Supreme Court has observed as follows:

> "merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while, we are told the Railways are making purchases without any tender on a proprietary basis only from EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14."

The above said passage clearly shows that since the Railways not only rejected the offer of the writ petitioner therein arbitrarily, the writ petitioner therein was virtually debarred from competing with EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during the entire period the Railways were making purchases without any tender on a proprietary basis only from EDC, the Honourable Supreme Court of India held that the action of the Railways is in flagrant violation of the constitutional mandate of Article 14.

12. In the instant case, there is no rival claimant to the petitioner herein. It is not the case of the petitioner that to help some other bidder, the sale in favour of the petitioner was cancelled and hence no question of discrimination is involved in this case. Similarly, the impugned proceedings of the respondent herein cannot be termed to be arbitrary, because the respondent has only invoked condition No.11 of the general conditions of sale. Even assuming for a moment that the said decision of the Honourable Supreme Court of India applies to the facts of this case and there is any legal infraction of the rights of the petitioner, the same could be raised before the arbitrator, with regard to which I am going to discuss below.

13. The learned counsel has actually produced a copy of the tender notification. The learned counsel as above said only relied upon the general condition No.11, but the learned counsel conveniently omitted to draw the attention of this Court to condition No.28 of the general conditions which reads as follows:

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"In case of any dispute, the same shall be referred to a single arbitrator, to be appointed by the SELLER and the Arbitration proceedings would be governed by 'Arbitration and Conciliation Act' 1996".

14. The auction sale in question partakes the character of contract which comes within the realm of original contracts and it cannot be said to be a statutory contract. In this context, it will be useful to refer to the decision of the Honourable Supreme Court of India reported in A.I.R. 1977 S.C. 1496 (Radhakrishna Agarwal Vs. State of Bihar), where the Supreme Court has held as follows:

" 'It is true that Art. 14 of the Constitution imports a limitation or imposes an obligation upon the State's executive power under Art. 298 of the Constitution. All constitutional powers carry corresponding obligations with them. This is the rule of law which regulates the operation of organs of Government functioning under a Constitution'.

'At the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all, the State, no doubt, acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract and relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract'.

'Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract, facts have to be investigated and found before the question of a violation of Art. 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily

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by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution'."

The above said decision of the Honourable Supreme Court of India clearly lays down that after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

15. Thus, the above decision of the Honourable Supreme Court effectively answers the contentions raised by the learned counsel for the petitioner. It is not the case of the petitioner that the contract of sale entered into by the petitioner with the respondent pursuant to the auction sale is a statutory contract or any statute has stepped-in to confer some special statutory power or obligation on the State. Therefore, this is a contract pure and simple and hence the petitioner can only claim rights conferred upon him by the contract and he is bound by the terms of the contract.

16. When condition No.28 of the general conditions of auction provides for arbitration, the petitioner is bound by the same and the petitioner cannot ignore the arbitration clause and approach this Court under Article 226 of the Constitution of India.

17. It is settled law that if a right has been claimed in terms of the contract, such a right cannot be enforced in a writ petition filed under Article 226 of the Constitution of India. In other words, the extraordinary remedy cannot be invoked for the enforcement of contractual obligations, since the same can be resorted to on the basis of the agreement executed between the parties, i.e. by invoking the arbitration clause. It is also a settled law that a party to a contract is bound by the arbitration clause contained in the contract and he has to seek for arbitration in terms of the stipulations contained in the agreement. Hence, having agreed to abide by the conditions contained in general conditions of the auction, which contain as above said an arbitration clause in condition No.28, the petitioner cannot invoke the writ jurisdiction of this Court.

18. The above view of mine is supported by the decision reported in 1998 (1) C.T.C. 369 (Venkatasami, B. Vs. General Manager, Southern

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Railway and Others) and by the decision of a Division Bench of this Court reported in 2000 (4) C.T.C. 711 (Union of India Vs. Sri Gayathri Agencies).

19. In this context, it is also useful to refer to the decision of the Honourable Supreme Court of India reported in A.I.R. 1996 S.C. 3515 (State of U.P. Vs. Bridge & Roof Co. (India) Ltd.), wherein in Paragraph No.21, the Apex Court held as follows:

> "There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter-alia for settlement of disputes by reference to arbitration (Clause 67 of the Contract). The Arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226. The said Article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra".

In the light of the law laid down by the Supreme Court of India, in the above said decision, the petitioner can very well invoke the arbitration clause contained in condition No.28 of the general conditions of the auction.

20. As pointed out by the Apex Court, an arbitrator can decide both question of fact as well as question of law and there is no reason why the petitioner should not follow and adopt that remedy and instead invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. The existence of an effective alternative remedy by way of arbitration - being provided in the general conditions of auction sale itself is a good ground for this Court to decline to exercise its extraordinary jurisdiction

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under Article 226. The prayer for issuance of writ of certiorari is wholly misconceived. In this case, the petitioner is not seeking to enforce any of his statutory rights nor is he seeking to enforce any statutory obligation cast upon the respondents. Therefore, the above writ petition itself is misconceived and accordingly the writ petition is liable to be dismissed and accordingly it is dismissed. No costs. Consequently, the connected WPMP is closed.

srk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Deputy Commissioner of Customs (Docks)
   APPG, Docks (UCC)
   Ground Floor, Customs House,
   No.33, Rajaji Salai, Chennai - 600 001.

2. The Assistant Commisioner of Customs (Docks UCC),
   APPG, Docks (UCC),
   Ground Floor, Customs House,
   No.33, Rajaji Salai, Chennai - 600 001.

+ one cc to Mr.N.Kirupakaran, Advocate Sr.No.17862.

AKM (CO)
RSM/13.4.2006

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